Supreme Court, U.S.
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No. 06-629

IN THE

Supreme Court of the United States

Jorge Albert Diaz,
Petitioner

v.

United States of America,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in direct conflict with the Ninth Circuit, the Second Circuit erred in holding that this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, does not apply retroactively to cases on collateral review. This question is pending before this Court in *Whorton* v. *Bockting*, cert. granted May 15, 2006. ___ U.S. ___, ___ S.Ct. ___, 74 U.S.L.W. 3639.

2. Whether this Court's decisions in *Blakely* v. *Washington*, 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004) and *United States* v. *Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), to the extent that they clarify the rule in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000), apply retroactively to an initial motion under 28 U.S.C. §2255. This question is pending before this Court in *Burton v. Waddington*, cert. granted June 5, 2006, __ U.S. __ (Docket No. 05-9222);

Parties to the Proceeding

The parties to the proceedings in the United States Court of Appeals for the Second Circuit included the United States and petitioner Jorge Albert Diaz. There are no parties to the proceedings other than those named in the petition.

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OPINION BELOW

A panel of the United States Court of Appeals for the Second Circuit issued an order denying petitioner's application for a certificate of appealability. Appendix at 12a. The unpublished opinion of the United States District Court for the Eastern District of New York is attached in the Appendix at 1a.

JURISDICTION

Petitioner's application for a certificate of appealability was denied on March 29, 2006. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him."

Statement of the Case

Petitioner is entitled to a summary reversal and remand for further consideration in the light of this Court's forthcoming decisions in *Burton* v. *Waddington*, No. 05-9222 and *Whorton* v. *Bockting*, No. 05-595.

Background

Jorge Albert Diaz was one of seven defendants charged with conspiracy to import cocaine and distribute it in the United States in 2000. He was convicted, after a jury trial, of conspiracy to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(ii). However, he was acquitted of conspiracy to import cocaine. Mr. Diaz was sentenced to 210 months in prison, to be followed by five years of supervised release, and a $20,000 fine.

The Trial

This case grew out of an elaborate joint FBI/NYPD undercover operation that, over the course of several months, spanned Colombia, Puerto Rico, the Cayman Islands, and New York.

Despite the fact that the government amassed a massive amount of detailed knowledge about this organization and its participants, petitioner was entirely unknown to the government until minutes before his arrest. An undercover agent and a confidential informant, posing as cocaine suppliers, met at a restaurant with one of petitioner's co-defendants. The co-defendant was supposed to provide a car, into which the undercover and confidential informant would load cocaine and deliver it to other co-defendants. The car would then be returned to the co-defendant. At the meeting, they discussed the amount of cocaine he would be picking up (100 kilograms), and the arrangements with respect to the use of a rental car. The car ultimately provided to the agents by the co-defendant had been rented by Mr. Diaz.

After the meeting was completed and the three men left the restaurant, they encountered Mr. Diaz outside. After an extremely brief conversation with the agent outside the restaurant, Mr. Diaz was subsequently arrested.

There was no dispute at trial that petitioner had rented the car and was to be involved in its return. The critical question at trial was whether Mr. Diaz knew what the car was to be used for.

The only other evidence that connected petitioner to the conspiracy was the co-

defendant's guilty plea allocution, which the government read to the jury. During that allocution, the co-defendant was asked specifically about the restaurant meeting. He also stated that in July 2000 he discussed the cocaine distribution plan with someone else named in the indictment (not the confidential informant) and that he and that co-defendant were planning to distribute 100 kilograms of cocaine. In context, the jury could only conclude that the co-defendant was referring to Mr. Diaz.

As trial counsel explained on several occasions — immediately after the allocution was read to the jury, in a motion for a mistrial, and in a motion for a new trial — counsel had the opportunity to redact the allocution before it was read to the jury, but failed to redact the portion inculpating the petitioner because of inattention and not for any strategic purpose. Counsel explained that he had been under pressure to make hasty decisions, and stated that if he had been thinking more clearly, he would have challenged the admission of the co-defendant's allocution in its entirety. The government did not dispute that the co-defendant was alluding to Mr. Diaz in the allocution, but merely contended that such an allusion was permissible, since it did not refer to him by name. The judge denied petitioner's motions for a mistrial and a new trial.

In closing remarks, counsel for the government made sure that the jury could not miss the allusion to petitioner, by highlighting

the allocution while discussing petitioner's alleged involvement in the conspiracy.

The jury found Mr. Diaz guilty of conspiracy to distribute five kilograms or more of cocaine and attempted possession with intent to distribute five or more kilograms of cocaine. He was acquitted of conspiring and attempting to import cocaine.

The Sentence

The Probation Department concluded that Mr. Diaz should be held accountable for 100 kilograms of cocaine — the amount the co-defendant had agreed upon in petitioner's absence — and calculated his base offense level using that amount. Mr. Diaz argued, under this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), that he could not be held accountable for 100 kilograms, because the jury did not make any finding that he agreed to distribute more than five kilograms.

The trial court rejected his *Apprendi* argument and sentenced petitioner to a term of imprisonment of 17½ years.

Direct Appeal

On direct appeal, petitioner reasserted, *inter alia*, his contention that his sentence was improperly based on facts not proven to a jury beyond a reasonable doubt.

In an unpublished opinion, the Court of Appeals for the Second Circuit affirmed Mr. Diaz' conviction and sentence. The Court acknowledged that the jury may well have determined that he did not have actual knowledge of the drug transaction. However, the Court rejected appellant's argument that it was improper to sentence him on the basis of an agreement to distribute 100 kilograms of cocaine, when the jury had only found that he was guilty of conspiracy to distribute five or more kilograms of cocaine. The Court presumed that *Apprendi* did not apply to sentences within the maximum prescribed by the statute setting forth the crime.

Motion to Vacate

Mr. Diaz then timely filed a motion to vacate set aside, and correct his sentence pursuant to 28 U.S.C. §2255. He argued that (1) his sentence violated the mandates of *Apprendi*, as clarified in *Blakely* and *Booker*, since it was based on facts that were not decided by a jury beyond a reasonable doubt; (2) his Confrontation Clause rights were violated by permitting the government to introduce at trial his co-defendants' guilty plea allocutions, one of which inculpated him; and (3) he was denied the effective assistance of counsel at trial when his counsel failed to make a contemporaneous objection to the introduction at trial of the inculpatory portions of his co-defendant's guilty plea allocution, not for any strategic reason, but merely because of a self-confessed oversight.

In his Memorandum in Support of his Motion, petitioner raised the issue of the retroactivity of *Blakely*, and argued that, since it merely clarified the rule enunciated in *Apprendi*, *Blakely* did not create a new constitutional rule..

Petitioner also argued in his Memorandum that *Crawford* did not create a "new rule" with respect to the admission of the co-defendant's plea allocution, since it involved prior testimony given under circumstances where the defendant did not have the opportunity to cross-examine the witness..

In response to Mr. Diaz' motion, the government argued that his Confrontation Clause issue was a *Crawford* claim, and that *Crawford* was not retroactive to cases on collateral review. However, the government did **not** argue that *Blakely* and *Booker* should not be applied to petitioner's sentence retroactively. Rather, it implicitly conceded that *Blakely* and *Booker* applied, but argued that they should not change the outcome in his case.[1]

Petitioner filed a reply memorandum, arguing that the government had waived a

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[1] The government contended: "In *Booker*, the Court rendered the Guidelines advisory and, in so holding, expressly rejected Diaz's argument that all sentencing factors must be proved to a jury beyond a reasonable doubt. . . . As such, the *Blakely* decision, as interpreted in *Booker*, provides no support for Diaz's argument."

Teague nonretroactivity defense by failing to raise it in its brief.

In an unpublished opinion filed March 11, 2005, the district court denied petitioner's § 2255 motion. Without any discussion of his waiver argument, the court ruled that "*Booker* does not apply retroactively to any cases on collateral review." Similarly, the district court rejected petitioner's argument that his Sixth Amendment right to confront witnesses against him was violated by the introduction at trial of his co-defendant's plea allocution, concluding that *Crawford* enunciated a new rule but did not establish a watershed rule and should not be applied retroactively on collateral review. Appendix

The district court denied petitioner a certificate of appealability with respect to any of his claims, ruling that he failed to make a substantial showing of any denial of his constitutional rights.

Mr. Diaz sought a certificate of appealability from the United States Court of Appeals for the Second Circuit. He argued that at least the substantive portion of *Booker*, which clarified the rule in *Apprendi*, applied retroactively to an initial motion under 28 U.S.C. §2255; in any event, he contended, the government waived the *Teague* defense by failing to raise it. Petitioner also argued that *Crawford* did not create a new rule with respect to cases such as his, which involved the introduction of evidence that did *not* fall within a

firmly-rooted exception to the hearsay rule. Finally, he contended that he was denied the effective assistance of counsel when his attorney, due to inattention rather than as a matter of strategy, failed to ensure that an incriminating reference to him was redacted from the co-defendant's plea allocution before it was read to the jury.

Although the Court of Appeals invited the government the opportunity to respond to petitioner's application, the government chose not to submit opposing papers.[2]

On March 29, 2006, the Second Circuit denied Mr. Diaz' application, stating that he had not made a substantial showing of the denial of a constitutional right.

REASONS FOR GRANTING THE PETITION

(1) This Case, in Which a *Crawford* Challenge Was Presented and Rejected Below on Nonretroactivity Grounds, Should be Held for Disposition Pending This Court's Decision in Whorton v. Bockting, 74 U.S.L.W. 3639.

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[2] The Court of Appeals docket sheet contains the following entry on March 15, 2006: "Notice to counsel: Motion for a certificate of appealability has been placed on the Court's Substantive Motions Calendar .... Any opposing papers to Calendar Team ASAP."

At issue in this case is whether Crawford v. Washington, 541 U.S. 36 (2004), applies retroactively to cases on collateral review when that decision was announced. The circuits are in conflict as to whether *Crawford* applies retroactively to such cases.

In *Crawford*, this Court made clear that the Confrontation Clause's prohibition against introducing ex parte testimonial statements must be strictly interpreted. To the extent that the test it enunciated in Ohio *v.* Roberts, 448 U.S. 56 (1980), permitted the admission of prior testimony of a hearsay declarant upon a sufficient showing of reliability, this Court rejected it in favor of an inquiry into whether the defendant had a prior opportunity to cross-examine the witness.

However, nothing in the *Ohio* v. *Roberts* decision sanctioned the introduction of a hearsay declarant's prior testimony, where, as here, it did not fall within a "firmly rooted hearsay exception" and the defendant did not have the opportunity for cross-examination at the prior proceeding. In those situations, at least, *Crawford* is not a "new rule."

Petitioner's *Crawford* issue was preserved in the district court by his motions for a mistrial and a new trial, and in his motion to vacate pursuant to 28 U.S.C. 2255.

In Whorton v. Bockting, ___ U.S. ___, ___ S.Ct. ___, 74 U.S.L.W. 3639 (May 15,

2006), this Court granted certiorari to resolve the question of *Crawford's* retroactivity. Because this Court's disposition of *Whorton* will determine the outcome here, this case should be held pending the decision in *Whorton*.

II. This Case, in Which a *Booker/Blakely* Challenge Was Presented and Rejected Below on Nonretroactivity Grounds, Should be Held for Disposition Pending This Court's Decision in Burton v. Waddington, 05-9222.

In Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004), this Court held that "the 'statutory maximum' for [Apprendi v. New Jersey, 530 U.S. 466 (2000)] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis in original). In United States v. Booker, 125 S.Ct. 738 (2005), a majority of this Court held that *Blakely* applied to the United States Sentencing Guidelines. Booker, 125 S. Ct. at 755-56. As a remedy, a different majority of this Court severed and excised 18 U.S.C. § 3553(b)(1), which required mandatory application of the guidelines, and § 3742(e), which governed appellate review in a manner no longer relevant to advisory guidelines. *Id.* at 756-57. Following *Booker*, district courts must consult the guidelines but are not required to apply them in imposing sentence.

The issue in petitioner's case is whether *Blakely* applies retroactively on collateral re-

view, because its heightened burden of proof not only vindicates fundamental fairness, but also enhances the accuracy of sentencing, and because *Blakely* was merely the logical extension of *Apprendi*.[3]

The *Blakely* claim in this case was preserved in the trial court, where petitioner raised his *Apprendi* claim prior to sentencing. The trial court rejected his claim, which was raised again on direct appeal and rejected by the Court of Appeals. On his motion to vacate pursuant to 28 U.S.C. §2255, petitioner again raised his *Apprendi/Blakely* claim in the district court. He sought a certificate of appealability on this issue, which was summarily denied.

In Burton v. Waddington, ___ U.S. ___, ___ S.Ct. ___, No. 05-9222 (June 5, 2006), this Court granted certiorari to resolve the retroactivity question. Because this Court's disposition of *Burton* will determine the outcome here, this case should be held pending the decision in *Burton*.[4]

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[3] Moreover, in petitioner's case, the government waived the retroactivity issue by failing to argue it, even though petitioner had alerted it to the issue by discussing it in his memorandum in support of his § 2255 motion.

[4] Although *Burton* involves a state sentencing scheme, whereas petitioner's case involves the Federal Sentencing Guidelines, the result in *Burton* will control, because this Court has already determined

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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that *Blakely* applies to the Guidelines. United States v. Booker, 125 S.Ct. 738 (2005).

APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 8, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04 CV 4124 (ARR)

JORGE ALBERT DIAZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

ROSS, United States District Judge:

The petitioner Jorge Albert Diaz ("Diaz" or petitioner) filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 on September 13, 2004. Petitioner claims that: (1) his sentence violates the Sixth Amendment of the Constitution; (2) he was denied his Sixth Amendment right to confront witnesses against him; and (3) he was denied the effective assistance of counsel by his trial attorney's failure to ensure that an indirect reference to him was redacted from a co-defendant's plea allocution before it was read to the jury. For the reasons stated below, the petition for a writ of habeas corpus is denied.

Appendix A

BACKGROUND

Petitioner's conviction arose from a conspiracy to import cocaine into the United States from Colombia. He was arrested as part of a joint FBI-NYPD undercover operation. At trial, a co-conspirator's redacted guilty plea allocution was read to the jury. During the allocution, the co-conspirator spoke about a White Castle restaurant. Other evidence presented to the juryshowed that petitioner had been waiting outside that restaurant while the co-conspirator discussed the cocaine transaction with an undercover agent and a confidential informant. The co-conspirator also stated during the allocution that he had discussed the plan to distribute cocaine with a person named in the eight defendant indictment. The co-conspirator's allocution did not name petitioner or otherwise implicate him.

Following his jury trial, petitioner was convicted of conspiracy to distribute five kilograms or more of cocaine and of attempting to possess five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(ii). On June 5, 2002, the court sentenced petitioner to 210 months' imprisonment, as well as a five-year term of supervised release, and imposed a $20,000 fine and a $200 special assessment, having found that he was responsible for 100 kilograms of cocaine. Diaz appealed his conviction and sentence to the Second Circuit, which affirmed both by summary order dated April 8, 2003. *United States* v. *Florez-Belluccio*, 62 Fed. Appx. 391, 2003 WL 1867926 (2d Cir. Apr 8, 2003). On direct appeal, petitioner argued that the district court had erred by (1) admitting evidence of his prior drug conviction for the limited purpose of proving

knowledge, and (2) instructing the jury on conscious avoidance. Petitioner also argued that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), should be extended to require that the jury find that he had personal knowledge of the quantity of drugs involved in the conspiracy and attempted possession. The Court of Appeals rejected each of these arguments. Petitioner's conviction thus became final on approximately July 8, 2003, ninety (90) days from the date his conviction was affirmed by the Second Circuit. He timely filed his petition for a writ of habeas corpus on September 13, 2004, within the one-year statute of limitations.

I. *Sentencing Claim*

Petitioner argues that, because a judge, and not a jury, found that his offense involved 100 or more kilograms of cocaine, his sentence ran afoul of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *United States* v. *Booker*, 125 S.Ct. 738 (2005). The Supreme Court held in *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490. The 210-month sentenced imposed on petitioner is less than the 240-month statutory maximum for distributing an unspecified amount of cocaine. 21 U.S.C. § 841(b)(1)(C). Moreover, petitioner's sentence was at the bottom of the Guideline range. His sentence was thus permissible under *Apprendi*.

Petitioner may not avail himself of the Supreme Court's recent decisions in *Blakely* v. *Washington*, 124 S.Ct. 2531 (2004), or *United States* v. *Booker*, 125 S.Ct. 738 (2005). In

Green v. *United States*, 397 F.3d 101 (2d Cir. 2005), the Second Circuit held that neither *Booker* nor *Blakely* applies retroactively to a second or successive habeas petition. The instant case, however, involves a habeas petition not yet decided at the time of the announcement of the new rule of law and thus is not on all fours with *Green*. While the Second Circuit has yet to address the issue, the court adopts the reasoning in *Hamdani* v. *United States*, No. 04 Civ. 3332 (DGT), 2005 WL 419727 (E.D.N.Y. Feb. 22, 2005), that *Booker* does not apply retroactively to any case on collateral review. *Id.* at *2; *see also McReynolds* v. *United States*, 397 F.3d 479, 481 (7th Cir. 2005)(holding that *Booker* does not apply retroactively to criminal cases that became final before its release on January 12, 2005). Because petitioner's conviction and sentence became final long before *Booker* was decided, that case's approach does not apply to this collateral review.

II. *Confrontation Clause Claim*

Petitioner argues that his Sixth Amendment right to confront the witnesses against him was violated by the introduction at trial of several of his co-conspirators' redacted guilty plea. He relies on the Supreme Court's recent decision in *Crawford* v. *Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), which was decided after the Second Circuit had denied petitioner's appeal. Petitioner's claim is without merit. In *Crawford*, the Court ruled that out-of-court statements of a person who does not appear as a witness at trial that are of a "testimonial" nature may not be received against the accused to establish the truth of what was stated unless (1) the declarant is unavailable to testify at the trial, and

(2) the accused was afforded a prior opportunity to cross-examine the declarant on the statement. *Id.* at 1365-66. The Second Circuit recently held that the rule established in *Crawford* does not apply retroactively. *Mungo* v. *Duncan*, 393 F.3d 327 (2d Cir. 2004). In *Mungo*, the Second Circuit discussed the Supreme Court's ruling in *Teague* v. *Lane*, 489 U.S. 288 (1989), that new procedural rulings do not apply in the collateral review of convictions that became final before those rulings were announced. The rule in *Teague* provides an exception for new "watershed" rules of criminal procedure. *Id.* at 311. In *Mungo*, the Second Circuit ruled that the *Crawford* did not establish a watershed rule and that it should not be applied retroactively on collateral review. 393 F.3d at 336.

Notwithstanding the Second Circuit's decision in *Mungo*, petitioner argues that *Crawford* does not enunciate a new rule with respect to the plea allocutions of co-conspirators because, under *Lily* v. *Virginia*, 527 U.S. 116 (1999), an accomplice's confession that inculpates a de-fendant is not a firmly-rooted exception to the hearsay rule. *Id.* at 134. Petitioner's argument is inapposite. "Prior to the Supreme Court's ruling in *Crawford*, it was appropriate to introduce a *properly redacted* plea allocution of a co-conspirator as a statement against penal interest to prove the existence of the conspiracy or scheme, and conduct in furtherance of it." *United States* v. *Borden*, No. 02 Cr. 929 (DLC), 2005 WL 31949, *4 (S.D.N.Y. Jan. 5, 2005)(internal citations omitted and emphasis added). After *Crawford*, however, the plea allocutions of unavailable co-conspirators may not be admitted at trial without violating the Sixth Amendment unless there has been a prior opportunity for cross-

examination. *United States* v. *McClain*, 377 F.3d 219, 222 (2d Cir. 2004). Because *Crawford* was decided after petitioner had concluded the appeal of his conviction, petitioner may not invoke the new rule established in that case. Habeas relief is not warranted on this claim.

III. *Ineffective Assistance Claim*

Petitioner argues that he was denied the effective assistance of counsel by his trial counsel's failure to ensure that an indirect reference to him was redacted from the co-conspirator's plea allocution before it was read to the jury. Petitioner's claim that because the allocution stated that the co-conspirator had discussed the plan to distribute cocaine with another co-conspirator, and other evidence introduced at trial indicated that petitioner was the only person with whom the allocating defendant had contact, the jury could only conclude that the allocution referred to petitioner. Petitioner claims that the allocution was particularly significant because it was respondent's strongest evidence that petitioner's was a knowing and intentional participant in the conspiracy.

Although respondent argues that petitioner waived this claim by failing to raise it on direct appeal, petitioner properly raised his ineffective assistance claim for the first time on collateral review. In *Massaro* v. *United States*, 538 U.S. 500 (2003), the Supreme Court held that there is no procedural default for failure to raise an ineffective assistance claim on direct appeal. *Id.* at 504-05. The Supreme Court abrogated the Second Circuit's decision in *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), which had held that where a

petitioner is represented by new counsel on appeal and the ineffective assistance claim is based solely on the record made at trial, the claim must be made on direct appeal. *Sweet* v. *Bennett*, 353 F.3d 135, 140 (2d Cir. 2003). Thus, petitioner is not barred from raising his ineffective assistance claim for the first time in his habeas petition.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test to determine if counsel's assistance was ineffective: whether counsel's performance fell below an objective standard of reasonableness and whether defendant suffered prejudice resulting from counsel's performance. *Id.* at 687-88. Despite petitioner's contention that this is not a *Bruton* case, petitioner's ineffective assistance claim implicates the Sixth Amendment right to confront adverse witnesses. The claim is that counsel's failure to ensure that the co-conspirator's plea allocution was redacted to eliminate all indirect references to petitioner, thereby violating the Confrontation Clause, constituted ineffective assistance. The court need not consider whether petitioner suffered prejudice from counsel's performance as petitioner cannot show that counsel's performance fell below an objective standard of reasonableness.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the introduction of the confession of a non-testifying co-defendant that implicates the defendant in a crime. *Id.* at 126. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court limited the reach of *Bruton* by holding that when a confession is redacted so that it does not facially

incrimiate the defendant, its admission with a proper limiting instruction does not violate the Confrontation Clause. *Id.* at 211. The Court later held, in *Gray* v. *Maryland*, 523 U.S. 185 (1998), that *Bruton* applies to "statements that, despite redaction, obviously refer directly to someone, often obviously to [the defendant], and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. In a case similar to the one at bar, where a co-conspirator's plea allocution was admitted as evidence of the existence and scope of the conspiracy, the Second Circuit found no *Gray* violation where the "the plea allocution was not incriminating on its face because it did not directly implicate [the defendant]." *United States* v. *Smith*, 198 F.3d 377, 385 (2d Cir. 1999). After *Gray*, the Second Circuit has found no *Bruton* Confrontation Clause violation where the alloction did not name the defendant and the allocution alone was not incriminating to the defendant, even if it, along with other evidence at trial, implicated the defendant. *Aramus* v. *Donnelly*, No. 99 Civ. 11306 JSRJAP, 2002 WL 31307929, *13 (S.D.N.Y. Oct. 15, 2002)(citing *United States* v. *Wimbley*, No. 01-1048, 19 Fed. Appx. 24, 27-28, 2001 WL 998061, *3 (2d Cir. Aug. 29, 2001)).

In the instant case, petitioner takes exception to the allocution of one of the eight defendants charged in the indictment that was read to the jury as follows:

> COURT: Did you, sometime between April and July of last year, knowingly and intentionally agree with other people to distribute, I gather, as much as 100 kilograms of cocaine? Did you do that?
>
> DEFENDANT: Yes.

Appendix A

COURT: And you discussed the distribution of this cocaine with someone in July?

DEFENDANT: Yes. I discussed it with someone.

COURT: Was it . . . were you and this individual planning . . .

DEFENDANT: Yes.

COURT: . . . to distribute 100 kilograms of cocaine?

DEFENDANT: Yes, your Honor.

COURT: Was the individual with whom you met one of the people who are named in this indictment?

DEFENDANT: Say that again?

COURT: Was the person that you are speaking about, the person with whom you had this agreement . . . was that one or more of the people named in this indictment? You read the indictment?

DEFENDANT: Yes.

COURT: Speak with Mr. Frocaro. I need to know whether it was one or more of those people.

MR. FROCARO: Judge, you're not asking him to identify the person?

UNIDENTIFIED: She just wants to know that it's not an undercover.

DEFENDANT: Yes.

COURT: So, it is one of the people that is named in the indictment? I'm not asking you to name which one.

DEFENDANT: Yes, it's one of the people named in the indictment.

COURT: Is the White Castle in Brooklyn?

DEFENDANT: In Manhattan.

* * *

The co-conspirator's allocution to which petitioner takes exception makes clear that the co-conspirator had discussed with one of the eight defendants named in the indictment a plan to distribute 100 kilograms of cocaine. The jury was aware that the indictment referenced in the allocution was a multi-defendant indictment.

Petitioner does not claim that the redacted allocution, on its own, directly incriminated him. Rather, petitioner states that the allocution indirectly incriminated him and was significant in light of other evidence presented at trial.

See, e.g., Petitioner's Affirmation at ¶ 10. The allocution only indicates, however, that the allocating defendant had discussed a plan to distribute 100 kilograms of cocaine with one of the other defendants named in the indictment. On its face, the allocution did not implicate petitioner either directly or indirectly, as petitioner was one of many defendants named in the indictment. Because the allocution standing alone is not incriminating, petitioner cannot establish legal error, much less that counsel's performance fell below an objective standard of reasonableness. Habeas relief is not warranted on this claim.

CONCLUSION

For the foregoing reasons, the court denies the instant petition for a writ of habeas corpus. No certificate of appealability is granted with respect to any of the petitioner's claims, since the petitioner failed to make a substantial showing of any denial of his constitutional rights. The petitioner has a right to seek a certificate of appealability from the United States Court of Appeals for the Second Circuit. *See* 28 U.S.C. § 2253.

The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

/s/ Allyne R. Ross
United States District Judge

Dated: March 8, 2005
Brooklyn, New York

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION AND DISMISSING THE APPEAL FILED MARCH 29, 2006

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 29th day of March two thousand and six,

Present:

Hon. Wilfred Feinberg,
Hon. Robert A. Katzmann,
Hon. Reena Raggi,
Circuit Judges.

05-1607-pr

Jorge Albert Diaz,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is DENIED and the appeal is DISMISSED,

because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk's Office

By: /s/ Lucille Carr

Filed Mar 29, 2006

FILED
JAN 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-629

In the Supreme Court of the United States

JORGE ALBERT DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies retroactively to cases on collateral review.

2. Whether this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review.

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JORGE ALBERT DIAZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 12a-13a) is unreported. The opinion of the district court (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2006. The petition for a writ of certiorari was filed on June 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to distribute five kilograms or more of cocaine and of attempting to possess with intent to distribute five kilograms or more of cocaine,

both in violation of 21 U.S.C. 846. He was sentenced to 210 months of imprisonment to be followed by five years of supervised release. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a.

Petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied petitioner's motion and denied him a certificate of appealablility (COA). Pet. App. 1a-11a. The court of appeals also denied petitioner's application for a COA. *Id.* at 12a-13a.

1. Petitioner, Maza-Bohos, and others conspired to distribute cocaine. Unbeknownst to the conspirators, the suppliers of the cocaine were government agents. Government agents met Maza-Bohos at a restaurant where they discussed plans for the delivery of 100 kilograms of cocaine to Maza-Bohos. After a series of cellular phone calls between petitioner and Maza-Bohos, petitioner rented a car and drove it to the restaurant. Petitioner then waited outside the restaurant. Maza-Bohos told the government agents that they should deliver the cocaine in a car supplied by Maza-Bohos. Maza-Bohos further informed the agents that petitioner was his partner and that petitioner and the car were outside the restaurant. The agents agreed to Maza-Bohos's plan for the delivery of the cocaine. Gov't C.A. Br. 3-5.[1]

The agents and Maza-Bohos then went outside the restaurant to meet petitioner. One of the agents asked petitioner if he was Maza-Bohos's partner, and petitioner confirmed that he was. Petitioner told the government agents that he wanted to get the car back between five and six o'clock the next morning. The agents

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[1] "Gov't C.A. Br." refers to the government's court of appeals' brief in petitioner's appeal from his conviction and sentence (No. 02-1369).

agreed and left in the rental car. Petitioner and other conspirators were then arrested. Gov't C.A. Br. 6-7.

2. A federal grand jury in the Eastern District of New York returned a four-count indictment charging petitioner and seven co-defendants with various drug offenses. See Dkt. Entry 33 (No. 1:00-cr-00851). At trial, the government introduced portions of several co-defendants' guilty-plea allocutions to establish the existence of a conspiracy. The allocutions were redacted to omit any direct or indirect reference to petitioner. The jury found petitioner guilty of one count of conspiring to distribute five kilograms or more of cocaine and one count of attempting to possess with intent to distribute five kilograms or more of cocaine. Pet. App. 2a, 4a, 8a-11a; Pet. Section 2255 Motion 5; 62 Fed. Appx. 391 (2003).

At sentencing, the district court found that petitioner was responsible for 100 kilograms of cocaine. Based on that finding, the court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a.

3. On appeal, petitioner argued that the district court had erred by admitting evidence of a prior drug conviction and by instructing the jury on conscious avoidance. Petitioner also argued that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), should be extended to require the jury to find that he had personal knowledge of the quantity of drugs involved in the conspiracy and attempted possession. Petitioner did not raise any Confrontation Clause challenge to the admission of his co-conspirators' allocutions. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a-3a; 62 Fed. Appx. 391 (2003).

4. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. In his motion, petitioner raised three claims: (1) that his sentence violated the Sixth Amendment under *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court increased the Guidelines sentence based on judicial factfinding; (2) that the admission of his co-defendants' guilty-plea allocutions violated petitioner's Sixth Amendment right to confront the witnesses against him under *Crawford* v. *Washington*, 541 U.S. 36 (2004); and (3) that the failure of his trial counsel to redact an indirect reference to petitioner in one of the guilty-plea allocutions denied petitioner the right to effective assistance of counsel. Pet. App. 1a-11a.

The district court denied petitioner's motion. The court held that petitioner's *Booker* and *Crawford* claims were barred because neither decision applies retroactively to cases on collateral review. Pet. App. 3a-6a. The court rejected petitioner's ineffective-assistance claim because the allocution at issue had not implicated petitioner either directly or indirectly, and petitioner therefore could not establish either constitutionally deficient performance or prejudice. *Id.* at 6a-11a. The district court also held that petitioner was not entitled to a COA on those claims. *Id.* at 11a.

5. Petitioner filed an application for a certificate of appealability with the court of appeals. The court denied the application, holding that petitioner had failed to make a "substantial showing of the denial of a constitutional right." Pet. App. 12a-13a (quoting 28 U.S.C. 2253(c)(2)).

ARGUMENT

1. Petitioner seeks review of the question whether *Crawford* applies retroactively to claims on collateral review. That question is currently before the Court in *Whorton* v. *Bockting*, No. 05-595 (argued Nov. 1, 2006). Petitioner requests that the Court hold the petition in this case pending the decision in *Bockting*.

The Court need not hold the petition in this case pending the decision in *Bockting*. Even if the Court were to hold *Crawford* retroactive in *Bockting*, petitioner could not ultimately benefit from that ruling. That is because petitioner procedurally defaulted on his Confrontation Clause claim, and petitioner cannot satisfy the standards for overcoming that procedural default.

While petitioner asserts (Pet. 10) that he raised his Confrontation Clause claim in the district court, he failed to raise that claim on direct appeal. By failing to raise the claim on direct appeal, petitioner procedurally defaulted that claim. *Bousley* v. *United States*, 523 U.S. at 614, 621 (1998).

To overcome a procedural default, a petitioner must show either (1) cause for the default and actual prejudice or (2) actual innocence. *Bousley*, 523 U.S. at 623. Petitioner cannot satisfy either component of the cause and prejudice standard, and he also cannot establish actual innocence.

Cause for failing to raise a constitutional claim may exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). That was not the case here. The reconsideration of the Court's Confrontation-Clause jurisprudence undertaken in *Crawford* had long been advocated by jurists, litigants, and commentators.

See, *e.g.*, *Crawford*, 541 U.S. at 60-61; *Lilly* v. *Virginia*, 527 U.S. 116, 140-143 (1999) (Breyer, J., concurring); *White* v. *Illinois*, 502 U.S. 346, 363-366 (1992) (Thomas, J., concurring in part and concurring in the judgment). The interpretation of the Confrontation Clause that was ultimately adopted in *Crawford* was therefore reasonably available to petitioner.

Nor can petitioner demonstrate "actual prejudice." The allocutions at issue did not refer to petitioner and were admitted solely for the purpose of proving the existence of a conspiracy. Moreover, other evidence established both the conspiracy and petitioner's participation in it. See Pet. App. 10a-11a; Gov't C.A. Br. 3-7; 62 Fed. Appx. at 393. The admission of the allocutions therefore did not cause actual prejudice to petitioner.

Petitioner also cannot escape his procedural default through a claim of actual innocence. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation and internal quotation marks omitted). Given the evidence against petitioner, no such showing can be made here.

The government did not raise petitioner's procedural default below. But that does not mean that the Court should consider petitioner's defaulted claim. A court has discretionary authority to deny petitioner relief based on procedural default even when the government has failed to raise the issue of default at the earliest opportunity. Cf. *Day* v. *McDonough*, 126 S. Ct. 1675, 1681-1684 (2006). Because petitioner plainly defaulted on his Confrontation Clause claim, there is no reason for the Court to consider it. To the extent that the Court concludes otherwise, however, it should hold the petition in

this case pending the decision in *Brockting* and then dispose of the petition as appropriate in light of that decision.

2. Petitioner contends (Pet. 11-12) that *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review. He contends further (Pet. 11) that his petition should be held pending this Court's decision in *Burton* v. *Waddington*, No. 05-9222 (argued Nov. 7, 2006), because that decision will determine the outcome of his case. Petitioner's contentions lack merit.

A number of petitions for a writ of certiorari have recently presented the claim that *Booker* should apply retroactively to cases on collateral review. As the government has explained in its brief in opposition to one of those petitions, that claim does not warrant this Court's review. See U.S. Br. in Opp. at 6-11, *Guzman* v. *United States*, 127 S. Ct. 495 (2006) (No. 06-5662).[2] All 11 courts of appeals that have addressed the issue have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure and is not a "watershed" rule. Since the denial of a writ of certiorari in *Guzman*, this Court has denied review in several other cases raising identical claims. See, *e.g.*, *Newborn* v. *United States*, No. 06-5289; *Davis* v. *United States*, No. 06-5538; *Puzey* v. *United States*, No. 06-5541; and *Humphrey* v. *United States*, No. 06-5543 (cert. denied Nov. 13, 2006).

There is no reason to hold the petition pending this Court's decision in *Burton*, *supra*, which presents the question whether *Blakely* v. *Washington*, 542 U.S. 296 (2004), is retroactive. Petitioner would not directly benefit from a decision holding *Blakely* retroactive, because

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[2] We have provided petitioner with a copy of the government's brief in *Guzman*.

Blakely expressly declined to decide whether the rule in that case applied to the Federal Sentencing Guidelines. *Blakely*, 542 U.S. at 305 n.9. Further, as the government explained in its brief in *Guzman* (U.S. Br. in Opp. at 10-11 (No. 06-5662)), the question whether *Booker* is retroactive to cases on collateral review presents distinct issues from the question whether *Blakely* applies retroactively.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2007